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No. 98-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DWIGHT J. LOVING, Petitioner

v.

WILLIAM L. HART, Commandant,
United States Diciplinary Barracks and the
UNITED STATES OF AMERICA, Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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CAPITAL CASE

QUESTIONS PRESENTED

The United States Court of Appeals for the Armed Forces saved the military death penalty for felony murder from constitutional invalidation under *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) by construing the "actual perpetrator" aggravating factor of Rule for Court-Martial 1004(c)(8) as limited to a person who kills intentionally. Under *Cabana v. Bullock*, 474 U.S. 376 (1986), the Court of Appeals could have used other means to make the constitutionally indispensable culpability finding, but it determined that in a capital court-martial the factfinder at trial must make the culpability finding in determining the existence of the "actual perpetrator" aggravating factor. The result of the military court's decision in this case is a capital sentencing scheme in which the exclusive procedural vehicle for making the constitutionally requisite culpability determination is the finding of a particular aggravating factor ("actual perpetrator"), construed as having a *mens rea* element. Because the court-martial panel was not instructed with respect to the requisite *mens rea*, the military court's decision raises the following important constitutional questions:

I. Under a capital sentencing system in which the aggravating factor that the accused was the "actual perpetrator" of a felony murder is a) judicially construed as including a *mens rea* requirement, and b) used as the exclusive vehicle for making the constitutionally requisite culpability determination to support a death sentence, is a defendant constitutionally entitled to have the factfinder instructed about the *mens rea* element of the aggravating factor when that element is not even

remotely implied by the phrase "actual perpetrator"?

II. When a death sentence is imposed on the basis of a finding of such an "actual perpetrator" aggravating factor made by a factfinder who has *not* been instructed about the *mens rea* element, can the instructional omission be justified and the death sentence salvaged on appeal by the appellate court's conclusion that the version of the facts recounted in the accused's confession–which the trier of fact most likely did not fully accept–conclusively establishes that the defendant must have committed the killing intentionally?

III. Did the Court of Appeals err in refusing to consider issues of illegal voting procedures by the court-martial panel and of command influence in connection with these procedures, when these issues were raised by affidavits of three of the eight panel members, including the panel president; and does the panel president's dictation to a court-martial panel of illegal procedures based upon his misunderstanding of the military judge's instructions constitute command influence?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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Petitioner, Dwight J. Loving, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported as *Loving v. Hart,* 47 M.J. 438 (1998), and is included as Appendix A. The order denying reconsideration is included as Appendix B. The opinion of the Court of Appeals for the Armed Forces on mandatory review is reported as *United States v. Loving,* 41 M.J. 213 (1994), *modified on reconsideration,* 42 M.J. 109 (1995), and is included as Appendix C. The order denying reconsideration is included as Appendix D. The order denying the petition for reconsideration of mandatory review out of time is included as Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on February 26, 1998. Rehearing was denied by the United States Court of Appeals for the Armed Forces on April 9, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals) having reviewed this case pursuant to Uniform Code of Military Justice [hereinafter U.C.M.J.] article 67(a)(3), 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

2. The Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

3. Uniform Code of Military Justice [hereinafter U.C.M.J]. article 118(4), 10 U.S.C. § 918(4), which provides in pertinent part:

> Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he —
>
> . . . .
>
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause . . . (4), he shall suffer death or imprisonment for life as a court-martial may direct.

4. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 1004(c), which, at the time of petitioner's trial, provided in pertinent part:

> *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:
>
> . . . .
>
> (8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing.[1]

5. Manual for Courts-Martial, United States, 1984, Military Rule of Evidence [hereinafter M.R.E.] 606(b), which provides in pertinent part:

> *Inquiry into validity of findings or sentence.* Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a

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[1] R.C.M. 1004(c)(8) was subsequently amended in 1991 to provide:

That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

> member may testify on the question whether . . . there was unlawful command influence. Nor may the member's affidavit . . . concerning a matter about which the member would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

Petitioner, Dwight Loving, enlisted in the United States Army in 1986 and was serving as a Private (E1) at Fort Hood, Texas, at the time of his offenses and trial from January to April 1989. Petitioner was tried at Fort Hood before a general court-martial composed of eight officer members. He was found guilty of attempted murder, premeditated murder, felony murder, and four specifications of robbery, in violation of U.C.M.J. articles 80, 118(1) and (4), and 122, 10 U.S.C. §§ 880, 918(1) and (4), and 922, respectively.

With respect to the two murder charges, each homicide was charged as both premeditated murder and felony murder. The members unanimously convicted petitioner of both premeditated murder and felony murder of one of the two victims. With respect to Christopher Fay, however, the members unanimously convicted petitioner of felony murder, but found him guilty of premeditated murder only by a non-unanimous vote. The military judge dismissed the non-unanimous finding of guilty to premeditated murder of Christopher Fay as multiplicious with the felony murder conviction.

During the guilt-or-innocence phase instructions, the military judge listed the elements for the specification alleging felony murder of Christopher Fay. R. 1480.[2] While the military judge informed the members that the robbery had to

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[2] The relevant portions of the instructions during the guilt-or-innocence phase, R. 1473-83, are included as Appendix H.

be supported by the specific intent to deprive Christopher Fay and the Yellow Cab Company of cash, R. 1481, the military judge did not advise the members of any intent element concerning the killing.

In his sentencing instructions, the military judge told the members they could adjudge a death sentence if, "having been found guilty of the felony murder of Christopher Fay, as set forth in Specification 3 of Charge I, the accused was the actual perpetrator of the killing." R. 1866.[3] The military judge also emphasized that "the members of the court must agree beyond a reasonable doubt that one or more of the aggravating circumstances that I just mentioned existed at the time of the offenses or resulted from the offenses." R. 1866-67. The military judge repeated the elements of felony murder. R. 1868-69. Although the military judge advised the members that killing is unlawful "when done without legal justification or excuse," R. 1869, the sentencing instructions did not require that the felony murder aggravating factor be supported by a finding of intent to kill.

The members announced that they unanimously found three aggravating factors, including one—applicable only to the felony murder conviction—that alleged petitioner "was the actual perpetrator" of Christopher Fay's felony murder.[4] Based on the aggravating factors found pursuant to R.C.M. 1004(c)(7)(B) & (J) and R.C.M. 1004(c)(8), the panel sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances. The findings and sentence were affirmed by the convening authority and the United States Army Court of Criminal Appeals (formerly the United States Army Court of Military Review). *United States*

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[3] The instructions during the sentencing phase, R. 1863-87, are included as Appendix I.

[4] The other two aggravating factors were applicable only to the premeditated murder conviction.

v. Loving, 34 M.J. 956 (A.C.M.R. 1992). The Army court denied a petition for reconsideration on April 15, 1992. *United States v. Loving*, 34 M.J. 1065 (A.C.M.R. 1992).

During the mandatory review of the case by the Court of Appeals for the Armed Forces, Private Loving asserted, based on affidavits of three of the panel members, that his sentence must be set aside because the court-martial panel did not follow the proper objective voting procedures set forth in R.C.M. 1004 and R.C.M. 1006. Based on Military Rule of Evidence 606(b), however, the Court of Appeals, with Judge Wiss dissenting, concluded that the affidavits were not admissible evidence and affirmed the Army court's decision. *United States v. Loving*, 41 M.J. 213 (1994). This Court granted certiorari to review issues concerning the authority of the President to prescribe aggravating factors that permit a court-martial to impose a sentence of death. The Court affirmed on June 3, 1996. *Loving v. United States*, 517 U.S. 748, 116 S.Ct. 1737 (1996).

In reviewing the issues before it and addressing Article 118(4), this Court declared:

> The statute's selection of the two types of murder for the death penalty . . . does not narrow the death-eligible class in a way consistent with our cases. Article 118(4) by its terms permits death to be imposed for felony murder even if the accused had no intent to kill and even if he did not do the killing himself. The Eighth Amendment does not permit the death penalty to be imposed in those circumstances. *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378-3379, 73 L.Ed.2d 1140 (1982). As a result, additional aggravating factors establishing a higher culpability are necessary to save Article 118.

116 S.Ct. at 1742. In order to address the problem inherent in

petitioner's conviction under Article 118(4) and death eligibility as a result thereof, petitioner subsequently filed a Petition for Extraordinary Relief in the Army Court of Criminal Appeals seeking review of the issues regarding the lack of an intent element in U.C.M.J. Article 118(4) and R.C.M. 1004(c)(8). The Army Court summarily denied relief and petitioner appealed to the Court of Appeals for the Armed Forces. The Court of Appeals granted review and, after briefing and argument, denied relief.

While the writ appeal petition was pending before the Court of Appeals, petitioner also moved, on August 11, 1997, for leave to file a petition for reconsideration out of time with respect to the mandatory review decision in 1994. Petitioner sought reconsideration out of time because the court's decision refusing to grant relief based on the court-martial panel's improper voting procedures was contradictory to the court's subsequent opinion in *United States v. Thomas,* 46 M.J. 311 (1997),[5] where relief was granted based only on the likelihood–without proof–that the court- martial panel did not follow the proper voting procedures included in R.C.M. 1004 and R.C.M. 1006.[6] The motion for leave to file out of time and the petition for reconsideration were denied on February 26, 1998, with one Judge dissenting. *Loving v. Hart,* 47 M.J. 438 (1998) (Effron, J., concurring in part and dissenting in part).

HOW THE QUESTIONS PRESENTED WERE RAISED AND DECIDED BELOW

Before the Army Court and the Court of Appeals for the Armed Forces in the writ appeal proceedings, petitioner argued that because he was convicted of felony murder

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[5] The Court's opinion in *Thomas* is included as Appendix J.

[6] R.C.M. 1004 (prior to the 1991 amendment) and R.C.M. 1006 are included as Appendices F and G, respectively.

pursuant to U.C.M.J. Article 118(4) and because the aggravating circumstance was that he was the "actual perpetrator" in that felony murder (R.C.M. 1004(c)(8)), neither of which includes any element of an intent to kill, his sentence of death is incompatible with the Eighth Amendment. Specifically, petitioner argued that the Eighth Amendment requirement that "a capital-sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder,'" *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens,* 462 U.S. 862, 877 (1983)), was violated. The constitutional violation occurred in this case because even the combination of Article 118(4) and R.C.M. 1004(c)(8) does not include any finding of intent or the minimum *mens rea* constitutionally required for death eligibility. *Enmund v. Florida,* 458 U.S. 782, 796-97 (1982); *Tison v. Arizona,* 481 U.S. 137, 158 (1987).

The Army Court did not address the issue at all. The Court of Appeals, however, agreed that "felony-murder under Article 118(4) can pass constitutional muster as a capital offense only if it is combined with an aggravating factor sufficient to satisfy the narrowing requirement of *Zant v. Stephens, supra,* and culpability requirements of *Enmund* and *Tison*." 47 M.J. at 444. In addressing this issue, however, the Court of Appeals held that the "actual perpetrator" aggravating factor sufficiently performed the narrowing function of Zant and supplied the requisite *mens rea* because "in this case the court members understood the term to mean an intentional killing." Id.

The court held that "the military judge's failure to define 'actual perpetrator of the killing' was not error under the particular facts of this case." *Id.* at 444-45. Alternatively, the court held that "[e]ven assuming arguendo that an instruction

defining 'actual perpetrator of the killing' should have been given . . . such a deficiency was harmless beyond a reasonable doubt because it could not possibly have affected the court-martial's finding of the aggravating factor." *Id.* at 445. Finally, the court held that any deficiency in the military judge's instructions occurred at the point only of determining "death eligibility." Thus, the court declared that any error was harmless beyond a reasonable doubt because at least one other valid aggravating factor was found by the panel. *Id.* at 446.

With respect to the remaining question presented, petitioner asserted during mandatory review that his death sentence violates the Fifth, Sixth, and Eighth Amendments because the court-martial panel did not follow the proper voting procedures set forth in R.C.M. 1004 and R.C.M. 1006. Petitioner's arguments were based on affidavits of three of the eight panel members, including the panel president. Affidavits of COL Aylor, CPT Williams, and MAJ Napoli (Def. App. Exhs. F, G, and H, respectively), 41 M.J. at 331-33.

Despite the evidence before the court, the majority of the Court of Appeals, with Judge Wiss dissenting, rejected petitioner's arguments that M.R.E. 606(b) "preclude[s] inquiry only into the jury's compliance with substantive instructions such as what the jury may consider, but do not preclude inquiry into the jury's compliance with objective instruction such as voting procedures." 41 M.J. at 236-37. Likewise, the court rejected petitioner's arguments that, even assuming the applicability of M.R.E. 606(b), the affidavits were admissible because the affidavits indicate unlawful command influence on the part of the president, Colonel Aylor. 41 M.J. at 236.

Following the Court of Appeals' subsequent opinion in *Thomas,* petitioner moved for reconsideration out of time and requested the court to reconsider its decision that panel

member affidavits or testimony are inadmissible with respect to the procedural aspects of "the military sentencing reality" which favor the accused. *Thomas*, 46 M.J. at 315. The majority denied reconsideration without addressing the issue, while Judge Effron dissented on the denial of reconsideration and declared that petitioner's sentence should be set aside based on the procedural voting errors established by the panel member affidavits.

REASONS THE WRIT SHOULD BE GRANTED

I. IN VIOLATION OF THE EIGHTH AMENDMENT, THE "ACTUAL PERPETRATOR" AGGRAVATING FACTOR DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY OR REASONABLY JUSTIFY THE IMPOSITION OF THE ULTIMATE PUNISHMENT.

This Court previously held in *Loving v. United States*, 517 U.S. 748, 116 S.Ct. 1737 (1996), that "aggravating factors are necessary to the constitutional validity of the military capital punishment scheme as now enacted." 116 S.Ct. at 1742. This decision was based on the fact that Article 118's "selection of the two types of murder for the death penalty . . . does not narrow the death eligible class in a way consistent with our cases." *Id.* For example, Article 118(4) has no *mens rea* requirement, thus permitting the death penalty to be imposed even if the accused had "no intent to kill." *Id.* After reviewing the military death penalty complex, the Court concluded that "additional aggravating factors establishing a higher culpability are necessary to save Article 118." *Id.*

The Court's findings were based on the fact that aggravating factors "'must genuinely narrow the class of

persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" 116 S.Ct. at 1742 (quoting *Lowenfield v. Phelps, supra*). A critical facet of this narrowing process and "the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." *Tison v. Arizona,* 481 U.S. 137, 156 (1987).

At the broad ends of the spectrum, this Court held in *Enmund v. Florida,* 458 U.S. 782, 797 (1982), that the Eighth Amendment prohibits imposition of the death penalty on a person who may be guilty of felony murder as defined by the relevant jurisdiction, but who does not himself intend to kill. Likewise, *Enmund* makes it clear that the Eighth Amendment allows imposition of the death penalty for the felony murderer who intended to kill. Subsequently, in *Tison,* this Court clarified that the Eighth Amendment allows imposition of the death penalty on felony murderers on neither end of the spectrum so long as their participation in the crime was major and their mental state is one of "reckless indifference to the value of human life." 481 U.S. at 158.

The Court's analysis reveals the Eighth Amendment defect in petitioner's death sentence. Petitioner was found guilty of felony murder pursuant to Article 118(4), which as this Court recognized previously and as the Court of Appeals recognized in this case does not require an intent to kill. The Court of Appeals recognized that under *Cabana v. Bullock,* 474 U.S. 376, 392 (1986), it could have chosen to make the finding of the *mens rea* element of an intent to kill itself or to remand to the Army Court of Criminal Appeals to make a specific finding with respect to culpability but the court explicitly chose not to do so. 47 M.J. at 445. Instead the court chose to construe the "actual perpetrator" aggravating factor to include the requisite mental culpability of an "intent

to kill" which must be found by the factfinder during the capital sentencing proceeding at trial.

Essentially, the Court of Appeals agreed that "felony-murder under Article 118(4) can pass constitutional muster as a capital offense only if it is combined with an aggravating factor sufficient to satisfy the narrowing requirement of *Zant v. Stephens, supra,* and culpability requirements of *Enmund* and *Tison*." 47 M.J. at 444. In addressing the intent issue with respect to the aggravating factor, however, the Court of Appeals held that the "actual perpetrator" aggravating factor sufficiently performed the narrowing function of *Zant* and supplied the requisite *mens rea* because "in this case the court members understood the term to mean an intentional killing." *Id.*

As this Court has held, an aggravating factor which is invalid on its face may indeed be constitutional so long as the courts have "channel[ed] the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Lewis v. Jeffers,* 497 U.S. 764 , 774 (1990); *see also Arave v. Creech,* 507 U.S. 463 (1993). Nonetheless, while the Court of Appeals acknowledged that the military judge gave no guidance on this issue, it found no error because "[t]he issue of an accidental or unintentional killing was not raised" in Private Loving's trial. 47 M.J. at 445. Thus, the court concluded that "there is no reasonable possibility that the court members understood the term 'actual perpetrator of the killing' to mean anything other than an intentional killing." *Id.*

The lower court erred in several ways in reaching a conclusion to the contrary. First, the court simply assumed that the panel understood that they must find an intent or reckless indifference in order to find that petitioner was the "actual perpetrator," even though no military trial or appellate judge or anyone else could have known of such a requirement

until the lower court's opinion in this case. The bankruptcy of reasoning in the Court of Appeals' holding is apparent in the fact that at least one third of this Court (Justices Souter, Scalia, and Breyer) did not understand the term "actual perpetrator" to mean an intentional killing when this case was previously argued before the Court.

Justice Scalia exposed the problems with the Court of Appeals' finding during the previous oral argument in this case with the following hypothetical: "Suppose I drop a gun during a holdup. The [gun] goes off and kills somebody. Is that enough to satisfy the requirements of 10 U.S.C., section 918(4)?" *Loving v. United States,* 1996 WL 13954, at *34 (U.S. Oral Arg. Jan. 9, 1996) (No. 94-1966). In response, the government argued that R.C.M. 1004(c)(8) cured any potential Eighth Amendment problem where the accused was the triggerman. Justice Scalia, however, suggested that the triggerman requirement was inadequate to provide an intent requirement, since the actual triggerman could still kill negligently during the course of a felony. Justice Scalia ultimately stated that "as it now stands, I guess that means 118(4) is invalid, constitutionally invalid."[7] *Id.* at *51.

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[7] Justice Scalia's concerns echo Justice White's concurring opinion in *Lockett v. Ohio,* 438 U.S. 586 (1978), where he wrote, "[I]t violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." *Id.* at 628 (White, J., concurring in the judgment); *see also* James R. Acker & C.S. Lanier, *The Dimensions of Capital Murder,* 29 Crim. L. Bull. 379 (1993); Nelson Roth & Scott Sunby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads,* 70 Cornell L. Rev. 446, 484 (1985); F. Patrick Hubbard, Brenton Burry & Robert Widener, *A "Meaningful Basis" for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina,* 34 S.C.L. Rev. 391, 513-14 (1982); *The Supreme Court 1986 Term—Leading Cases, Death Penalty—Felony Murder,* 101 Harv. L. Rev. 119, 145 (1987); Michael J. Roman, Comment, *"Once More Unto the Breach, Dear Friends, Once More": A Call to Re-evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of State v. Oimen and State v. Rivera,* 77 Marq. L. Rev. 785, 822 (1994).

Justice Souter and Justice Breyer have also previously contradicted the Court of Appeals' assumption that a factfinder would understood "actual perpetrator" to include an intent to kill. Justice Souter when considering the aggravating factor in conjunction with Article 118(4) asked, "[W]e're still left without mens rea, aren't we?" 1996 WL 13954, at *12. Justice Souter also pointed out that the aggravating factor "still doesn't get you to intent." *Id.* at *35. Likewise, Justice Scalia pointed out that "[t]he triggerman can do it accidentally," *id.*, and specifically stated that "[y]ou can perpetrate the killing without intending to kill," *id.* at *51. Finally, Justice Breyer pointed out that, considering Article 118(4) and the actual perpetrator aggravating factor together, a person who negligently kills during a robbery may be convicted of murder and "provided he's the person who did it negligently and therefore unlawfully, [the scheme] would permit the imposition of the death penalty." *Id.* at *52.

The Court of Appeals erred because as is self-evident from a review of R.C.M. 1004(c)(8), the "actual perpetrator" aggravating factor does nothing to establish a constitutionally relevant state of culpability rendering a capital defendant death eligible. Indeed, the "actual perpetrator" aggravator involved in this case does not fulfill the constitutional mandate because any defendant found guilty of murder pursuant to Article 118(4) who either acts alone or who is the actual perpetrator is automatically eligible for the death penalty. R.C.M. 1004(c)(8) thus cannot be said to genuinely narrow the pool of persons eligible for the death penalty.

In fact, for narrowing purposes, it is just as if the factor did not exist. Put differently, it is clear that a jurisdiction could not—consistent with the Eighth Amendment—have a statute which declared that any defendant acting alone (or who is the actual perpetrator) who is found guilty of felony murder is automatically eligible for the death penalty. But

that is precisely what Article 118(4) and R.C.M. 1004(c)(8) permit, and that is why the Eighth Amendment is violated.[8]

II. IN VIOLATION OF THE EIGHTH AMENDMENT, PETITIONER WAS SENTENCED TO DEATH ON THE BASIS OF AN "ACTUAL PERPETRATOR" AGGRAVATING FACTOR WHEN THE COURT OF APPEALS DETERMINED THAT THE FACTFINDER MUST MAKE THE DETERMINATION OF "INTENT TO KILL" BUT THE FACTFINDER AT TRIAL WAS NOT INSTRUCTED ON THE JUDICIALLY CONSTRUED *MENS REA* ELEMENT THAT IT WAS SUPPOSED TO FIND.

The lower court declared no error in the military judge's failure to instruct on "intent to kill" as an element of "actual perpetrator." Nonetheless, the court held alternatively that "[e]ven assuming arguendo that an instruction defining 'actual perpetrator of the killing' should have been given . . . such a deficiency was harmless beyond a reasonable doubt because it

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[8] In fact, although the argument is strongest in the felony murder context, it is unlikely that it would be determinative from a constitutional standpoint if the case involved premeditated murder. For example, if a defendant were found guilty of premeditated murder, an aggravating circumstance that the defendant actually committed the murder would not suffice to permissibly "narrow the class" of death eligible individuals. It is not enough to say that a person in guilty of murder and what makes it worse is that he actually committed the murder. What *Gregg v. Georgia*, 428 U.S. 153 (1976), and its progeny require is that there be a murder "plus" something which makes the murder more culpable than other murders. Premeditation alone is not sufficient. This is clear from this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and its actions in *Furman's* aftermath. For example, Pennsylvania filed a petition for rehearing after the *Furman* decision, maintaining that *Furman* was not applicable because Pennsylvania only utilized the death penalty for premeditated murder. This Court, however, denied the petition for rehearing, thus invalidating all death sentences in Pennsylvania.

could not possibly have affected the court-martial's finding of the aggravating factor." 47 M.J. at 445. It is unclear, however, what aggravating factor the court referred to as being unaffected.

If the court found the error to be harmless because the panel would still have found that petitioner was the "actual perpetrator" in terms of being the triggerman then the error clearly was not harmless because of the constitutional infirmity that there is no finding of mental culpability inherent in a finding that petitioner was the "actual perpetrator." The court apparently relied instead on its holding that a reasonable factfinder could come "to no other conclusion," based on the particular facts of this case, than that this was "an intentional killing." *Id.* Specifically, the court declared that "[u]nder these facts, there is no reasonable possibility that the court members understood the term 'actual perpetrator of the killing' to mean anything other than an intentional killing." *Id.* Likewise, the court declared, "The overwhelming and uncontested evidence established that appellant, acting alone, personally and intentionally killed Mr. Fay." Id. The court also specifically relied on the fact that "[t]he issue of an accidental or unintentional killing was not raised" in petitioner's trial. *Id.* Given these findings, it is clear that the Court of Appeals essentially reduced its characterization of the *mens rea* element included in "actual perpetrator of the killing" to be an "intentional killing" as juxtaposed to an "accidental or unintentional killing."

While the Eighth Amendment requires that a finding with respect to a felony murderer's mental culpability must be made in order for a death sentence to be constitutionally valid, this Court has specifically declared that "[a]t what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution." *Cabana v. Bullock*, 474 U.S. 376, 386

(1986). Thus, this Court has held that the Eighth Amendment is satisfied as long as "the requisite findings are made in an adequate proceeding before some appropriate tribunal–be it an appellate court, a trial judge, or a jury." *Id.* at 392. The determination of what the "appropriate tribunal" is to make the culpability determination is left to the individual jurisdiction to decide. *Id.*

In this case, the Court of Appeals for the Armed Forces clearly declared that the court-martial panel–the factfinder at trial–is the appropriate body to make the determination that the accused has the constitutionally requisite mental culpability for death eligibility. Specifically, the court declared that the words "actual perpetrator of the killing" are sufficient to perform the constitutional narrowing required by *Zant v. Stephens*, 462 U.S. 862 (1983), and to satisfy the minimum culpability requirements of *Enmund v. Florida*, 458 U.S. 782 (1982), only so long as this aggravating factor is "understood [by the factfinder] to be limited to a person who kills intentionally or acts with reckless indifference to human life," 47 M.J. at 444.

The lower court's decision that the *Enmund/Tison* determination of the constitutionally minimum mental culpability required for death eligibility must be made by the court-martial panel in its finding of the aggravating factor entails a number of legal consequences. First, because R.C.M. 1004(b)(4)(A) requires that aggravating factors be found *unanimously* beyond a reasonable doubt, the court's decision requires that the finding of an "intent to kill"–read into "actual perpetrator" by the court–must be found unanimously by the court-martial panel. Second, because the aggravating factor must be found by the factfinder at trial, petitioner is constitutionally entitled to have the panel make the finding by fair and reliable procedures. *Gardner v. Florida*, 430 U.S. 349 (1977) (a capital defendant is entitled

to even-handed and fair procedures which lead to the imposition of a death sentence, even if he has no right to object to the particular result of the sentencing process).

The procedures used in this case, however, were not fair and reliable. While the court-martial panel was expected to make the finding that petitioner had the intent to kill Christopher Fay, the panel received absolutely no instruction or guidance on this issue from the military judge. Thus, the court simply assumed that the panel understood–without any instruction– that "actual perpetrator" actually means "an actual perpetrator who intended to kill." However, as is addressed previously, the words "actual perpetrator" do not in their ordinary and plain meaning–or even under any stretch of the imagination–include any *mens rea* element. Thus, even though the court declared that the factfinder must actually make the determination of the intent to kill, the court found harmless error not because the panel actually made the finding but because *"[u]nder these facts,* there is no reasonable possibility that the court members understood the term 'actual perpetrator of the killing' to mean anything other than an intentional killing." 47 M.J. at 445 (emphasis added).

The particular "facts" the court relied on was the version of the killing recounted in petitioner's confession, which had been recited by both the Army Court and the Court of Appeals itself in earlier appeals. *Id.* The lower court's conclusions and its reasoning based on these facts were impermissible, however for several reasons. First, while the "facts" recounted in petitioner's confession *may* have been found *verbatim* by the court-martial panel, they *need not* have been and *might not* have been the "facts" found by the factfinder in this case. *Cf. Schiro v. Farley,* 510 U.S. 222, 233 (1994) (appellate court cannot speculate on facts found by jury when the jury could have reached alternative conclusions based on the facts in evidence). Indeed, while the lower court speculated that the

panel accepted petitioner's version of the facts as the facts of the case the far more likely scenario is that the panel did not accept the specific version of the "facts" contained in the confession. Why? Because the court-martial panel did not unanimously find an intent to kill. Specifically, the panel was instructed on *both* premeditated murder and felony murder during the guilt-or-innocence phase of the trial, and it did not unanimously find that petitioner premeditated Mr. Fay's murder. Thus, the military court's declaration that there is no reasonable possibility the panel did not unanimously find an intent to kill is directly contradicted by the trial record.

Moreover, the circumstance that the Army Court and the Court of Appeals had earlier accepted the version of facts cited in petitioner's confession is unsurprising and insignificant. Appellate courts commonly state "the facts of the case" in terms of *whatever findings the factfinder could have made that would be most favorable to the party who won the verdict below* because that party is entitled to rely on this version of the facts for purposes of sufficiency of the evidence review. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979). That "most favorable" version of the facts–whose acceptability on appeal *results from* the factfinder's verdict following presumably correct instructions of law–cannot be assumed to represent "the facts" for purposes of determining how the factfinder *understood its instructions and applied them in reaching this very verdict. See Boyde v. California,* 494 U.S. 370, 380 (1990) (when instructions are challenged, the proper inquiry "is whether there is a reasonable likelihood that the jury has applied the challenged instruction" improperly to the facts before it). To do so would deprive the litigant who complains of erroneous jury instructions of his right–basic to our system of trials and appeals–to have *both* correct rules of law submitted to the factfinder and the factfinder's judgment of the facts based upon those instructions. *See Sullivan v. Louisiana,* 508 U.S. 275 (1993)

(reasonable doubt instructions which violate the due process principles articulated in *Cage v. Louisiana,* 498 U.S. 39 (1990) can never be harmless error).

III. THE EIGHTH AMENDMENT IS VIOLATED WHEN THE FACTFINDER RESPONSIBLE FOR MAKING THE EXCLUSIVE FINDING OF *MENS REA* REQUIRED FOR DEATH ELIGIBILITY IS NOT INSTRUCTED ON ITS DUTY TO DO SO AND THE CONSTITUTIONAL ERROR SUBSTANTIALLY AFFECTED THE CAPITAL SENTENCING PROCESS.

Because the court of appeals found that any deficiency in the military judge's instructions occurred at the nonweighing point of determining "death eligibility," the court declared that no reversal was required because at least one other valid aggravating factor was found by the panel. 47 M.J. at 446. This simplistic automatic affirmance was error, however, because the existence of a valid aggravating factor in a nonweighing process does not necessarily excuse a constitutional error with respect to a second invalid aggravating factor. *Tuggle v. Netherland,* 516 U.S. 10, 14 (1995) (per curiam).

Moreover, the court's reliance on the fact that other aggravating factors were found–in the context of the military capital sentencing structure–is a far different context than that present in *Tuggle* and in the context of most capital sentencing schemes. Specifically, pursuant to R.C.M. 1004, there are different and exclusive aggravating factors which apply with respect to Article 118(1) offenses and Article 118(4) offenses. While two other aggravating factors were found to exist in this case those factors are applicable solely to the premeditated murder (Article 118(1)) of Mr. Sharbino. Thus, with respect to the Article 118(4) conviction for the murder of Mr. Fay, the panel was not instructed on and did not find any

other aggravating factor. Therefore, if the "actual perpetrator" aggravating factor is constitutionally invalid, there is no second, valid aggravating factor on which an automatic affirmance rule can be based. In this context, it is clear that the sentencing process was in fact affected, because rather than being death eligible for two offenses, petitioner was actually death eligible for only one offense.

Likewise, the constitutional error cannot simply be automatically affirmed in the context of the weighing process required by R.C.M. 1004 because "appellant's role as the 'actual perpetrator of the killing' was properly considered by the members as an aggravating circumstance," pursuant to R.C.M. 1001, 47 M.J. at 446, as opposed to a specific aggravating factor, pursuant to R.C.M. 1004. The lower court simply concluded that because "the same facts and circumstances remained on the same sides of the scale," *id.*, that there was no possible prejudice resulting from the panel's consideration of the constitutionally invalid "actual perpetrator" aggravating factor. In doing so, the lower court erred in several different ways.

First, the court completely discounted the effect of mislabeling the "actual perpetrator" evidence despite the fact that consideration of the evidence as an aggravating *factor*, pursuant to R.C.M. 1004, required a specific vote and unanimous finding beyond a reasonable doubt. In contrast, consideration of "the same facts and circumstances" as an aggravating *circumstance*, pursuant to R.C.M. 1001, would not require a specific vote or specific findings. Therefore, if the assumption is made—despite evidence to the contrary—that the panel followed its instructions,[9] then the mislabeling

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[9] Although the military judge's instructions, pursuant to R.C.M. 1004, required a vote on the aggravating factors and a unanimous finding beyond a reasonable doubt, according to the affidavits of three of the eight panel members, the panel did not in fact vote on aggravating factors in the sentencing phase of trial.

resulted in specific consideration and discussion and a specific vote on the actual perpetrator aggravating factor which highlighted that fact in deliberations in a manner which would not have occurred if the same evidence was considered as an aggravating circumstance which required no specific discussions, vote, or consideration.

Second, the court failed to adequately consider the fact that the panel was informed that petitioner had been convicted of two death eligible offenses when, in fact, he had been convicted of only one offense which could constitutionally support a death sentence. In finding no harm in this error, the court used insupportable circular reasoning based on its own previous holdings on mandatory review. Specifically, the court noted that in its mandatory review of this case, petitioner complained that the panel had not been adequately instructed that he could only be sentenced to death for murder and could not be sentenced to death on the basis of the remaining conglomeration of felonies for which he had been convicted. The court held then that the military judge had indeed identified the fact that both premeditated murder and felony murder were capital offenses in the instructions and on the findings worksheet in the guilt-or-innocence phase of trial. Based on these findings, the court held on mandatory review that it was "unwilling to presume that the court members did not know that a 'capital' offense is punishable by death," and found that the panel was clearly aware that it was allowed to sentence petitioner to death on the basis of both premeditated murder and felony murder. *Loving*, 41 M.J. at 252.

In these proceedings, however, where it is now clear that petitioner could not–consistent with Eighth Amendment principles–be sentenced to death on the basis of the felony murder conviction, the Court of Appeals reversed itself and declared that "the military judge's identification of capital offenses was so minimal" that the panel members clearly

could not be affected by the identification of felony murder as a capital offense. 47 M.J. at 446. This finding is clearly in direct contravention of the court's previous finding: *either* the panel was erroneously and unconstitutionally left with the misunderstanding that petitioner could be sentenced to die for all of the offenses for which he had been convicted *or* the panel clearly understood the few instructions that it was given–that petitioner could be sentenced to die for both premeditated murder and felony murder. In either case, the error clearly is not harmless because both would inject an arbitrary and constitutionally significant error in the sentencing proceedings.

Finally, the lower court failed to factor into its harmless error analysis the fact that it had previously found other invalid aggravating circumstances and errors in the capital sentencing process in this case. Specifically, the lower court previously held that the military judge erred in characterizing evidence of petitioner's lack of rehabilitative potential as an aggravating circumstance which could be considered in the weighing of aggravating and mitigating circumstances. *Loving*, 41 M.J. at 248. Thus, the court had already found a "'thumb' on 'death's side of the scale,'" 47 M.J. at 446 (quoting *Stringer v. Black*, 503 U.S. 222, 232 (1992)), even without the improper consideration of the actual perpetrator aggravating factor and consideration of felony murder as a death eligible offense when the requisite *mens rea* was not found by the factfinder. While the rehabilitative potential issue may have tipped the scales only slightly, the combination of this error and the improper consideration of the felony murder as a capital offense and the improper consideration of the actual perpetrator evidence as an aggravating factor as opposed to an aggravating circumstance certainly significantly changes the balance in favor of death. *Cf. Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (errors should be "considered collectively, not item-by-item").

IV. THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER ISSUES OF ILLEGAL VOTING PROCEDURES AND OF COMMAND INFLUENCE BY THE PRESIDENT OF THE PANEL IN CONNECTION WITH THESE PROCEDURES WHEN THESE ISSUES WERE RAISED BY AFFIDAVITS OF THREE PANEL MEMBERS INCLUDING THE PANEL PRESIDENT.

Congress has mandated that when a military accused is convicted unanimously of premeditated or felony murder, the court-martial may proceed with the capital sentencing hearing. In order to adjudge a sentence of death, the members must follow the voting procedures set forth in R.C.M. 1004 and R.C.M. 1006. First, the members must vote on each aggravating factor on which they have been instructed. R.C.M. 1004(b)(7). Second, the members propose sentences. R.C.M. 1006(c). Third:

> All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule.

R.C.M. 1006(d)(3)(A). In order to impose a sentence of death, the panel members must vote unanimously to do so. U.C.M.J. article 52(b)(1); R.C.M. 1006(d)(4)(A). On the other hand, only a concurrence of three-fourths of the panel members is required to sentence an accused to life imprisonment. U.C.M.J. article 52(b)(2); R.C.M. 1006(d)(4)(B).

As the Court of Appeals recognized in *Thomas*, "the less-severe-sentence voting rule has a particular significance in the

death penalty context," 46 M.J. at 314, because if only three-fourths of the members vote for life when the voting begins, the question of death is never reached. This procedure is "a military sentencing reality" which favors the accused. *Id.* Petitioner, however, was deprived of the benefits of the procedures which create the "military sentencing reality," because the panel members followed improper voting procedures in sentencing petitioner to die.

Based on the affidavits of Colonel Cortez Aylor (Panel President), Major John Napoli, and Captain Thomas Williams, petitioner has repeatedly asserted a number of errors. First, the panel **did not vote at all on the aggravating factors.** Second, the members **did not propose sentences at all**, because COL Aylor understood the military judge's instructions to mean that it was either life or death and there were no other options. Third, because there were no proposals, the members did not begin voting with the least severe sentence. Rather, the panel took an either/or vote writing on their secret ballots "life" or "death." Finally, the panel's first vote was seven for death and one for life. Because it was non-unanimous, the panel took another vote after more discussion—again voting on life and death at the same time—and reached a unanimous sentence of death. Affidavits of COL Aylor, CPT Williams, and MAJ Napoli, 41 M.J. at 331-33.

Despite the evidence before the court, the majority of the Court of Appeals declared that "the affidavits are ambiguous at best," 41 M.J. at 235, while Judge Wiss in dissent declared that the affidavits were better described as "ambiguous at *least*," 41 M.J. at 313. The court rejected petitioner's arguments that Military Rule of Evidence 606(b) "preclude[s] inquiry only into the jury's compliance with substantive instructions such as what the jury may consider, but do not preclude inquiry into the jury's compliance with objective

instruction such as voting procedures." 41 M.J. at 236-37. Thus, the court concluded that "the affidavits of Colonel Aylor, Major Napoli, and Captain Williams may not be considered except for the limited purpose of determining if extraneous influence or unlawful command influence may have been injected into the proceedings." 41 M.J. at 237.

The majority of the court then turned to the question of command influence and declared first that petitioner "argues that the affidavits indicate unlawful command influence on the part of the president, Colonel Aylor." 41 M.J. at 236. Only a page later, however, the majority declared that petitioner "has not alleged that Colonel Aylor exercised unlawful command influence during the deliberations." *Id.* Judge Wiss, in dissent, however, noted that, while the issue was not addressed in the final brief before the Court, that Private Loving's counsel had clearly addressed this issue a number of times in oral arguments and the issue was squarely before the Court. *Id.* at 315. Neither the majority nor the dissenting judge, however, recognized that petitioner had repeatedly raised the issue of command influence in the pleadings before the court prior to oral argument.[10]

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[10] In his final brief, on which the court apparently exclusively relied, petitioner addressed the *substantive* issues raised by the panel member affidavits. The final brief was filed contemporaneously with the motion to admit the affidavits. After the government opposed admission of the affidavits, petitioner addressed the *procedural* issue of whether the affidavits were admissible and the basis of admissibility under M.R.E. 606(b), including command influence. Petitioner specifically argued that improper command influence was present in his "Reply to Government's Opposition to Appellant's Motion to Admit Defense Appellate Exhibits F-H" filed before the lower court on March 11, 1993. Likewise, petitioner again raised the issue of command influence in the "Petition for Reconsideration and Request for Specific Findings" filed before the court on May 3, 1993. Finally, on September 22, 1993, prior to the oral argument before the court on mandatory review, petitioner submitted a "Motion for Leave to file Supplemental Citations of Authority (2) and Response to Governmental Citations." Included in the supplemental citations were "[a]ll citations and

The President of the court-martial panel, COL Aylor, clearly exercised improper command influence in this case. Indeed, despite having received instructions on the appropriate procedural methods for deliberation, the panel–according to the three affidavits submitted by petitioner–deviated from the appropriate sentencing procedures no less than six times. 47 M.J. at 458. It is also clear that the procedural deviations "occurred as a result of the unilateral imposition by the senior-ranking member of the court-martial of a procedure that differed markedly" from the instructions given to the panel. 41 M.J. at 314.

Nonetheless, in resolving this issue, the lower court declined to consider the affidavits of the panel members based on Military Rule of Evidence 606(b). The court failed, however, to recognize that the panel member affidavits in this case addressed objective illegal voting procedures and command influence by COL Aylor, neither of which is prohibited testimony under M.R.E. 606(b). Indeed, the lower court failed to adequately consider these affidavits in light of the procedural aspects of "the military sentencing reality" discussed in its opinion in *Thomas,* 46 M.J. at 314, which has resulted in an anomalous result at best.

In *Thomas,* the military judge improperly instructed the panel members that they were to vote on the option of death first. Despite the fact that there was no evidence before the court about whether the panel members *actually* followed the instructions and *actually* voted improperly on death first, the Court of Appeals granted relief in *Thomas.* In petitioner's case, on the other hand, petitioner *has proven* in the only way possible—through panel member affidavits—that his

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arguments made in reply to Government's Opposition to Appellant's Motion to Admit Defense Appellate Exhibits F-H; the Petition for Reconsideration of the Order Denying Admission of Def. App. Exhs. F-H; and the *amicus* brief of the NAACP-Legal Defense Fund, Inc." These citations were accepted by the Court on September 22, 1993.

sentencing panel did exactly what was only feared in *Thomas*. Yet, petitioner was denied relief despite *actual proof*, while Thomas was granted relief only because of the fear that the panel had followed improper procedure based on the military judge's instructions.

As Judge Effron observed in his dissent from the denial of reconsideration, the lower court has ignored its own precedent twice in denying relief to petitioner. Despite its own precedent requiring further review when panel member affidavits simply raise "the potential for command influence," 47 M.J. at 458 (citing *United States v. Accordino*, 20 M.J. 102, 105 (1985), the lower court has denied relief. Moreover, the lower court has declined further review despite the dissents of Judge Wiss and Judge Effron based on "the cancerous possibility that command influence inside the members' deliberation room during their consideration of a sentence so skewed the legally required voting procedures that it undermined the fundamental fairness of these proceedings." 41 M.J. at 310; 47 M.J. at 459.

In addition to revealing the possibility of command influence, the panel member affidavits in this case clearly reveal that the panel made *no* specific finding of aggravating factors and did not follow any of the court's other instructions on the proper method for the capital sentencing process in the military. The panel simply made no determinations–as required by military law–which would distinguish petitioner from any other military accused convicted of murder. Thus, there has been a clear violation of the Eighth Amendment requirement that "a capital-sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces.

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